Supreme Court, U.S.
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87-79
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN O. MCELVEY, JR. and
TERRENCE L. MCCLAIN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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July 1987

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QUESTION PRESENTED

Whether a public employee with a constitutionally protected property interest in continued employment may, consistent with the Fifth Amendment, be removed without first being given a meaningful opportunity to respond to the charges made against him.

PARTIES TO THE PROCEEDINGS

Petitioners John O. McElvey, Jr. and Terrence L. McClain are former air traffic controllers removed in the wake of the 1981 strike. Petitioners' cases were consolidated before the Merit Systems Protection Board and heard by the same panel in the Court of Appeals for the Federal Circuit. Pursuant to Rule 19(4), petitioners submit this single petition to cover both cases.

Respondent is the United States Department of Transportation, Federal Aviation Administration.

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

JOHN O. McELVEY, Jr. and
TERRENCE L. McCLAIN,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

Petitioners John O. McElvey, Jr. and Terrence L. McClain hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Court of Appeals for the Federal Circuit's affirmed both petitioners' removals in unpublished decisions entered on July 3, 1986. See App. A infra at 1a; App. C infra at 6a. On March 4, 1987, the court below denied both Mr. McElvey's and Mr. McClain's requests for rehearing. See App. B infra at 4a; App. D infra at 9a. Petitioners' cases were consolidated before the Merit Systems Protection Board, both at the Board level and at the Regional Office level. The Board's decision is reported at 18 M.S.P.R. 231 (1983) (Adams v. Department of Transportation, F.A.A.), see App. E infra at 11a; the Regional Office decision is unpublished. See App. F infra at 17a (in pertinent part.)

JURISDICTION

The judgments of the court of appeals for both petitioners were entered on March 3, 1987. On May 20, 1987, petitioners requested an enlargement of time within which to submit their petitions for certiorari, and by separate orders issued May 22, 1987 (Nos. A-836 and A-845), Chief Justice Rehnquist granted petitioners until July 2, 1987 to submit this petition. This petition is, accordingly, filed within the time allowed by law. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

Title V, United States Code, section 7513(a) (1982) provides, in pertinent part:

> [A]n agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

STATEMENT

The facts in this case are identical, in all material respects, to those in Linda J. Darnell (Rose) v. Department of Transportation, Federal Aviation Admin., U.S. No. 86-1746 (petition for certiorari filed April 30, 1987).

Petitioners John O. McElvey, Jr. and Terrence L. McClain are both former air traffic controllers who were removed from their positions for alleged participation in the 1981 air traffic controller strike. Petitioners both were employed by the Department of Transportation, Federal Aviation Administration at the Washington National Tower. Both petitioners were

absent from the facility during the strike, and both petitioners received identical notices informing them of the charges against them and of their statutory rights to reply orally and in writing. See App. G infra at 48-51a; App. H at 58-61a. 1/

The notice did not specify an address to which written replies were to be sent: the only address appearing in the notice, that on the letterhead, was that of the FAA's Eastern Regional Office in Jamaica, New York. Accordingly, petitioners both timely responded to the notice of proposed removal by submitting to the Jamaica address a request that they be given additional time to respond to the

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1/ The notices petitioners received are identical in all material respects to those received by the petitioners in Linda J. Darnell (Rose) v. Department of Transportation, Federal Aviation Admin., U.S. No. 86-1746. Compare App. G and H at 48-51a and 58-61a with Darnell (Rose) v. Department of Transportation, Federal Aviation Admin., 807 F.2d 943, 950 (Fed. Cir. 1986).

proposed notice as well as a request that the information relied upon by the agency in proposing the action be sent to them. Both petitioners' responses were received at the Jamaica facility within the time allotted, but neither request was considered as the responses were not forwarded from Jamaica to Washington National until after the period for responding had expired. Thus, the FAA effectuated its proposals to remove petitioners, concluding that petitioners "made no oral or written reply." See App. G and H at 48-70a.

Thereafter petitioners sought review of their removals before the Merit Systems Protection Board and the Federal Circuit. At each level, including their request for rehearing in light of Judge Cowen's dissent in Darnell (Rose), petitioners argued that the FAA's preclusion of their opportunity to respond

orally and in writing unconstitutionally deprived them of property without due process. In each forum, petitioners' contentions were dismissed without discussion.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance. The decision of the court below negates the Due Process Clause as it applies to public employment. While it has long been recognized that tenured public employees who have a property interest in continued employment may only be terminated after being provided notice and an opportunity to respond, the court below has sanctioned the removal of such employees provided no meaningful pretermination rights. Such a precedent, contrary as it is to the decisions of this and other courts, and ruinous as it is to the concept of due

process, cannot be allowed to stand.

1. Petitioners were competitive service employees of the United States government when they were terminated for allegedly participating in the strike. 2/ Competitive service employees may only be removed from their positions "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). Accordingly, competitive service employees' "claim of entitlement," and hence their property interests in continued employment, arise from Congress' conditioning their removal on a finding of just cause. Board of Regents v. Roth, 408 U.S. 564, 577 (1972); Perry v. Sindermann, 408 U.S. 593, 601 (1972). See, also,

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2/ "Competitive service" positions include all positions in the executive branch which are not specifically excepted. See 5 U.S.C. § 2101(a). "Air traffic controller" positions (see 5 U.S.C. § 2109(1)) are not excepted from the competitive service.

Arnett v. Kennedy, 416 U.S. 134, 170 (1974) (recognizing a property interest in continued federal employment.) It is this interest in continued employment which is entitled to due process protections. See Brock v. Roadway Express, Inc., 107 S.Ct. 1740, 1746 (1987).

2. As this Court has repeatedly emphasized, "[t]he fundamental requirement of due process is to be heard 'at a meaningful time and in a meaningful manner.'" Mathews v. Eldridge 424 U.S. 319, 333 (1976), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Petitioners were denied this fundamental right.

Petitioners were informed that they had seven days to respond orally or in writing to the charges made against them. Petitioners were misinformed, however, as to where the FAA wished them

to make these replies. They mailed their replies (consisting of denials of involvement in any crimes, requests for copies of the documentation relied upon by the FAA in proposing removal and requests for additional time to respond) to the address on the letterhead of the letters proposing their removals. Petitioners' letters ultimately were forwarded to the Washington National Tower, but were not received in the facility until after the removal decisions had been made.

The Federal Circuit in Darnell (Rose) concluded that there was no denial of due process under these facts, reasoning that the Constitution requires only "that an opportunity be given an employee to present his side of the story; not . . . that the employee must present his side of his story to the agency prior to removal." Darnell (Rose), 807 F.2d at 945 (emphasis original). Yet after making

this unexceptional observation, the court ipse dixit concluded that the agency's "unfortunate" failure to receive the replies before deciding to remove the petitioners was "in the nature of procedural error[] and [was] not error[] of constitutional dimension." Id.

The Federal Circuit plainly misconceived the imperative of the Due Process Clause. The Constitution does not require merely that an individual be given an "opportunity" to respond before property is taken: the opportunity must be a meaningful one. Mathews v. Eldridge, 424 U.S. at 333. As this Court explained in Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545 (1985), a meaningful opportunity to respond in the employment context is an opportunity for the employee to present his side of the story to attempt to dissuade the decisionmaker from effectuating his pro-

posal. This opportunity must be provided before the removal, for "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." Loudermill, 470 U.S. at 543.

The Federal Circuit's tautological conclusion that the failure to allow a "presentation in fact" to be made before termination was a "procedural error" not of "constitutional dimension" turns the Due Process Clause on its head. Apparently, the court found solace in the fact that the FAA did provide an opportunity for the controllers to respond, failing only to provide a means by which these responses could be considered before the termination took effect. Since the Due Process Clause does not guarantee a "presentation in fact," the court reasoned, there was no error in the FAA's insuring that whatever

pretermination response was made would not reach the ear of decisionmaker until after the removal had been effected.

As Judge Cowen recognized in his dissent, the majority failed to follow the teaching of Loudermill. Darnell (Rose), 807 F.2d at 946 (Cowen, J. dissenting). The Due Process Clause requires that a meaningful opportunity to respond be provided before property may be taken, and in the public employment context this means an opportunity to invoke the discretion of the decisionmaker before the termination takes effect. Implicit in such a requirement is that the decisionmaker will hear, if not consider, the response. No pretermination process, no matter how extensive, is meaningful if it is not geared to bring the employee's side of the case to the decisionmaker's attention. The Constitution is not satisfied by giving employees an

opportunity to respond in a vacuum. Rather, due process requires that the decisionmaker hear the employees response before acting. The court erred in failing to recognize this distinction.

3. The court further erred in holding that failure to provide a pretermination opportunity to respond can be harmless error. Certainly an employer, hardened for litigation, can be expected to say that his decision would have been the same even if he had heard the employee's case, and perhaps a reviewing court could make such a finding. But unless the decisionmaker has no discretion (which was not the case here and can never be the case when facts are in dispute), the Constitution requires that the employee be given the opportunity to show that "a permissible course of action is [not] an appropriate one." Loudermill,

470 U.S. at 543 n.8.

The Federal Circuit's holding that the "procedural error" of not allowing for consideration of the replies was "harmless error," Darnell (Rose), 807 F.2d at 946, is irreconcilable with Loudermill. The Constitution requires a pretermination hearing because "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect." Loudermill, 470 U.S. at 543. While the extent of post-termination process available is relevant to determine the breadth of predeprivation process required, Brock v. Roadway Express, 107 S.Ct. at 1748, no amount of post-deprivation process can remedy the denial of a meaningful opportunity to respond before the termination takes effect. This is so most fundamentally because the opportunity to "invoke the discretion of

the decisionmaker" is irretrievably lost once the decision has been made. But more generally, this is so because "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." Carey v. Piphus, 435 U.S. 247, 266 (1978). See, also, Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915) ("To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits.")

4. The court's errors are not, however, limited solely to the facts of this case. Indeed, the Federal Circuit's decision has far-reaching implications, affecting even more than the millions of federal employees whose rights are

determined exclusively by the Federal Circuit. 3/ The Federal Circuit is recognized as the preeminent authority on the construction of federal personnel laws and regulations, and its decisions are often adopted by other federal and state courts considering parallel issues. Thus, because of its unique position, the Federal Circuit's decision is especially significant in the arena of federal and other public sector employment. For this reason, this Court's resolution of the issues raised here is particularly warranted.

5. The question presented in this case is identical to that raised in

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3/ Except for "mixed cases" involving allegations of discrimination actionable under Title VII (42 U.S.C. § 2000e-16) and other anti-discrimination statutes, judicial review of adverse action appeals before the Merit Systems Protection Board are heard exclusively in the Federal Circuit. See 5 U.S.C. § 7703(b)(1); 28 U.S.C. § 1295(a)(9).

Darnell (Rose) v. Department of Transportation, FAA, No. 86-1746. For the reasons stated by the petitioners in Darnell (Rose), and for the reasons stated herein, this Court should grant both petitions and resolve the important constitutional questions raised by the Federal Circuit's decisions. Because this case is factually and legally indistinguishable from Darnell (Rose), petitioners submit that this Court may wish to consider these cases together.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit should be granted.

Respectfully submitted,

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July 2, 1987 Attorneys For Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN O. McELVEY, JR.,	)	
	)	
Petitioner,	)	Appeal No.
	)	85-1372
v.	)	MSPB Docket No.
	)	DC075281F1060
DEPARTMENT OF	)	
TRANSPORTATION, FAA,	)	
	)	
Respondent.	)	

DECIDED: July 3, 1986

Before RICH, DAVIS, AND SMITH, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed.R. App.P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984); Schapansky v. Department of Transportation, FAA, 735

F.2d 477 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), and the presiding official adequately considered petitioner's case. Petitioner has failed to show that his reply to the proposed removal notice was timely, and thus he has failed to show that he was denied his right to reply to the proposed removal prior to his termination.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN O. McELVEY, JR.,	)	Appeal No.
	)	85-1372
Petitioner,	)	MSPB Docket No.
	)	DC075281F1060
	)	
DEPARTMENT OF	)	
TRANSPORTATION, FAA	)	
	)	
Respondent.	)	

Before RICH, DAVIS, and SMITH, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

/s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

3/4/87

Date

cc: Mr. Joseph B. Scott
Ms. Hillary A. Stern, DOJ

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TERRENCE L. McCLAIN,	)	
	)	
Petitioner,	)	Appeal No.
	)	85-1374
v.	)	MSPB Docket No.
	)	DC075281F1051
DEPARTMENT OF TRANSPORTATION, FAA,	)	
	)	
Respondent.	)	

DECIDED: July 3, 1986

Before RICH, DAVIS, AND SMITH, Circuit Judges.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioner's removal by the Federal Aviation Administration, Department of Transportation, is affirmed.

OPINION

Notwithstanding the request of counsel for oral argument, we have determined on the basis of the request and the briefs that oral argument will not be necessary because the dispositive issue or set of issues has been authoritatively decided, the facts and legal argument are adequately presented in the briefs and record, and the decisional process would not be aided by oral argument. Fed.R. App.P. 34(a).

This appeal raises no issue not resolved in, and presents no fact pattern which differs significantly from that in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Johnson v. Department of Transportation, FAA, 735 F.2d 510 (Fed. Cir. 1984); Schapansky v. Department of Transportation, FAA, 735

F.2d 477 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984), and the presiding official adequately considered petitioner's case. Petitioner has failed to show that he was not provided the opportunity to make an oral or written reply to the proposed removal letter and that harmful error was committed or that his absence from work was not due to strike participation.

The decision appealed from was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, was not obtained without procedures required by law, rule, or regulation having been followed, and was supported by substantial evidence. 5 U.S.C. §7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TERRENCE L. McCLAIN,	)	Appeal No.
	)	85-1374
Petitioner,	)	MSPB Docket No.
	)	DC075281F1051
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION, FAA	)	
	)	
Respondent.	)	

Before RICH, DAVIS, and SMITH, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

Francis X. Gindhart, Clerk

Date

cc: Mr. Joseph B. Scott
Ms. Hillary A. Stern, DOJ

APPENDIX E

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

NOLAN R. ADAMS,	)	MSPB Docket No. DC75281F0885
CHARLES S. ELLIOTT,	)	DC075281F0950
ROBERT G. GWYNN,	)	DC075281F0980
TERRENCE L. McCLAIN,	)	DC075281F1051
JOHN O. McELVEY, JR.	)	DC075281F1060
Appellants,	)	
v.	)	
DEPARTMENT OF TRANSPORTATION, FAA, Agency.	)	

OPINION AND ORDER

Appellants petition for review of an initial decision issued on January 25, 1983, in which the presiding official upheld the agency action removing appellants from their positions as Air Traffic Control Specialists based on charges of participating in a strike

against the United States Government and absence without leave (AWOL). The agency has also petitioned for review on the limited issue of the presiding official's finding that appellants had been unlawfully suspended during the notice period from the dates of their respective deadline shifts to the effective dates of their removals, and in addition, it has filed responses to the appellants' petitions for review.

Having considered the appellants' petitions for review, and finding that they do not meet the criteria for review, the Board hereby DENIES the petitions. 5 C.F.R.§1201.115. [1] However, we find that

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1. See Ketchem v. Department of Transportation, 10 MSPB 557 at 561-562 (1982), motion for clarification denied 12 MSPB 267 (1982) (official notice of the existence of an unlawful strike); Schapansky v. Department of Transportation, 12 MSPB 141 at 143 n.2, 143-144, 145-146 (1982) (prima facie case of strike participation, invocation of 5 U.S.C. §7513(b)(1) to shorten the notice period, and reasonableness of the (footnote continued)

the presiding official erred in finding that the agency suspended appellants during their removal notice period when it maintained them in a nonduty, nonpay status from the date of their respective deadline shifts until the effective date

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removal penalty); Desiderio v. Department of the Navy, 4 MSPB 171 (1980) (AWOL alone as cause for removal); Anderson v. Department of Transportation, 15 M.S.P.R. 157 at 164-165 (1983); Campbell v. Department of Transportation, 15 M.S.P.R. 92 at 105-106 (1983) (confusion as to deadline shift and employment status); Baracco v. Department of Transportation, 15 M.S.P.R. 112 (1983) (alleged harmful error in connection with notice of proposed removal, less than 7 days to respond); Noa v. Department of Transportation, 15 M.S.P.R. 126 at 138 (1983) (continuation of strike beyond August 6, 1983); Johnson v. Department of Transportation, 12 MSPB 187 at 192-193 (1982) (alleged coercion); Ervin v. Department of Transportation, 15 M.S.P.R. 587 at 589 (1983) (alleged disparate treatment with regard to varying deadline shifts); Anderson, supra, at 164-165 (alleged disparate treatment with regard to application of the "grace period"); and Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980) (factual conclusions and credibility determinations of presiding official not generally reviewed by Board.) All appellants allege harmful error in that their notices of proposed removal lacked proper specificity because appellants were allegedly not fired for striking and AWOL but for failure to return to work within the "grace period." See Anderson, supra, at 164-165 (appellants were charged with striking and AWOL and neither proof of deadline, nor notification thereof, can be regarded as an element of the strike charge).

of their removals. Therefore, the agency petition on this limited issue is hereby GRANTED. 5 U.S.C. §7701(e)(1).

The Board held in Martel v. Department of Transportation, 15 M.S.P.R. 141 at 146-147, 149-150 (1983), that in order to meet the burden of establishing jurisdiction over an alleged suspension during the notice period under 5 C.F.R. §1201.56(a)(2), an appellant must prove by preponderant evidence that the action was involuntary and disciplinary in nature, and that the employee was ready, willing, and able to work during the period of time in question. The last of the three criteria cannot be established without evidence that the appellant contacted an agency official with decision-making authority, in person or otherwise, and unequivocally notified the official that he was ready, willing, and able to return

to work. Id. at 149. Such a showing effectively establishes, without additional evidence, that the agency's action or inaction in continuing to maintain an appellant in a nonduty, nonpay status during the notice period was involuntary on the appellant's part and disciplinary in nature on the agency's part. Id. at 150. The records show that none of the appellants notified any agency official and indicated his readiness and desire to return to work. Thus, there is no showing that the appellant's nonduty, nonpay status during the notice period was disciplinary in nature or involuntary on the part of appellants. Consequently, the presiding official's finding that the appellants must be paid for the time between their deadline shifts and the effective dates of their removals must be REVERSED. See Initial Decision at 20-21.

This is the final order of the Merit Systems Protection Board with respect to the appeals of appellants Adams, Elliott, Gwynn, McClain and McElvey.

With respect to these appellants, the initial decision is AFFIRMED in part and REVERSED in part as set forth above. Accordingly, the removal actions are hereby SUSTAINED.

Each appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:
ROBERT E. TAYLOR,
WASHINGTON, D.C.

APPENDIX F

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NOLAN R. ADAMS	)	CASE NOS.
	)	DC075281F0885
	)	
CHARLES S. ELLIOTT	)	DC075281F0950
	)	
ROBERT G. GWYNN	)	DC075281F0980
	)	
RICHARD J. KING	)	DC075281F1002
	)	
CHARLES C. SHELLEMAN, JR.)	)	DC075281F1109
	)	
TERRENCE L. McCLAIN	)	DC075281F1051
	)	
JOHN O. McELVEY, JR.	)	DC075281F1060
	)	
VICTOR F. PADGETT	)	DC075281F1076
	)	
v.	)	
	)	
DEPARTMENT OF TRANSPORTATION, FAA	)	
	)	DATE:
	)	January 25, 1983

INTRODUCTION

The appellants filed timely appeals in September, 1981 1/ from action taken by the Federal Aviation Administration,

removing them from their positions of Air Traffic Control Specialists for their involvement in a strike against the Government of the United States and for absence without leave (AWOL).

JURISDICTION

Sections 7513(d) and 7701(a) of Title 5 U.S.C., permit an employee to appeal to the Board from agency action involving a removal. I find that the appellants held positions in the competitive service at the time the agency proposed their removal and that they were not serving a probationary period. I find, therefore,

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1/ These appeals were originally consolidated for hearing purposes only. However, upon my review of the records herein, I find that the issues raised by these appellants do not differ in any material respect, except as otherwise noted. For this reason, and in view of the authority granted me by 5 C.F.R. 1201.36(b), I am consolidating these appeals for purposes of a written opinion thereon, for such action will expedite the processing of these appeals without adversely affecting the interests of the parties herein.

that these appeals are properly before the Board. 5 U.S.C. §7511(a).

ANALYSIS AND FINDINGS

In order for the agency's decision removing the appellants to be sustained on appeal to the Board, the agency must show that it is supported by a preponderance of the evidence. 5 U.S.C. 7701(C)(1)(B); 5 C.F.R. 1201.56(a)(ii). The Board's regulations define the phrase "preponderance of the evidence" to mean "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. 1201.56(c)(2).

I find that the President gave the striking controllers a 48-hour grace period commencing 11 a.m., August 3, 1981,

to return to their jobs. 17 Weekly Comp. Pres. Doc. 845 (1981). I further find that the agency, in implementing President Reagan's ultimatum to return to work, interpreted the President's directive to mean that striking controllers could report to work at their first scheduled shift after the expiration of the 48-hour grace period. United States v. PATCO, 524 F. Supp. 160, 164 (D.C.C. 1981).

In Ketchem v. Federal Aviation Administration, MSPB Docket No DA075281F0713 (May 28, 1982), the Board found that the Professional Air Traffic Controllers Organization (hereinafter referred to as PATCO) called for an unlawful strike by air traffic controllers and that such strike "commenced on August 3, 1981, and was still in progress on August 6, 1981." Id., at 9. Moreover, "where an employee ... is charged with

participation in the strike on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on that date." Id. Since the appellants have presented no evidence refuting the Board's notice of the duration of the strike, I, too, will take official notice that the strike commenced on August 3 and continued through August 6.

The testimony of Mr. Harry T. Hubbard, Chief, Washington Tower, and the time and attendance records indicate that the first scheduled shift for the appellants was 3 p.m., August 5, except for appellants Elliott, Gwynn, and McElvey, whose first scheduled shifts were August 7 (7 a.m.), August 20 (4 p.m.), and August 7 (7 a.m.), respectively. With

respect to those appellants whose first scheduled shift commenced on August 5, I find that it falls within the official notice period. I turn now to the agency's evidence on the existence of the strike beyond August 6 and the appellants participation in the strike between August 3 and their first scheduled shifts.

Mr. Hubbard testified that he directed his supervisors in late May, early June 1981, to brief the appellants about their legal obligations in the event of a strike by PATCO. The appellants were read 18 U.S.C. §1918 making striking a crime against the Government of the United States, and each appellant was requested to sign a copy of his training record attesting to the fact that the statement was read to them. Mr. Hubbard further testified that a telegram, a facsimile of which is contained in the files submitted

by the agency in each appellant's case, was sent to them advising each that an illegal strike was in progress, that participation could result in severe disciplinary action, and that unauthorized absence indicates participation. The telegram also advised the appellants that they were to report for duty at their next scheduled shift. Mr. Hubbard also testified that none of the appellants reported for work nor did any call to explain his absence.

In support of its contention that the strike continued beyond August 6, Mr. Hubbard testified that beginning on August 3, "massive absenteeism" occurred commencing with the 7 o'clock shift; only 2 of 21 controllers reported for duty. Mr. Hubbard added that he implemented a contingency plan developed in the event of a strike by reducing air traffic by 50

percent, directing supervisors and other qualified staff to handle traffic, and requiring available personnel to work a 6-day week, 10 hours per day. Mr Hubbard went on to state that these conditions existed on August 7 and 20.

Mr. Hubbard further testified that he implemented police surveillance of the parking lot and placed guards at the entrance leading to the tower. The guards protecting the tower, continued Mr. Hubbard, were given a list of individuals authorized to enter the facility and, with respect to controllers, their names remained on the list until after their grace period had expired. At such time, stated Mr. Hubbard, the names of controllers not reporting for duty by their deadline shifts were removed from the list, thereby removing their access to the facility. Transcript in the hearing

of Nolan Adams, et.al. pp. 8-18, (hereafter "Tr. p.").

In further support of its views on the duration of the strike, the agency submitted two documents containing what is purported to be the signatures of Robert E. Poli, President, PATCO, and Robert E. Moyer, Executive Vice-President, PATCO, and which are titled "PATCO Presidential Update," dated September 25 (Agency Exhibit 19) and October 8 (Agency Exhibit 20), 1981. Each document represents the strike to continue as of its date of issuance. Additionally, the agency also submitted copies of various court orders involving restraining and fining PATCO for implementation and continuation of the strike. See United States v. Professional Air Traffic Controllers Organization (PATCO), Civil No. 81-0763-A (E.D. Va., filed August 3, 1981) (Temporary

Restraining Order) (Agency Exhibit 2); United States v. Professional Air Traffic Controllers Organization (PATCO) et al., Civil No. 81-0763-A (E.D. filed August 13, 1981) (Modified - Temporary Restraining Order) (Agency Exhibit 3); United States v. PATCO et al., Civil No. 81-763-A, filed September 30, 1981 (Order) (Agency 4); United States v. PATCO Locals et al., Civil Action No. 81-0763-A (E.D. Va., filed September 30, 1981) (Permanent Injunction) (Agency 5); United States v. PATCO et al., Civil Action No. 81-763-A (E.D. Va., filed October 20, 1981) (Order) (Agency 6); and United States v. PATCO et al., Civil No. 81-763-A (E.D. Va., filed

January 6, 1981) (Order) (Agency 8). 2/ Implicit in the orders issued by the United States District Court for the Eastern District of Virginia is a finding that the strike was in progress as of the date that the particular order was filed.

In Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (October 28, 1982), the Board stated that where "existence of a strike is a matter of general knowledge, the agency may establish a prima facie case of an employee's voluntary participation therein by presenting evidence of his unauthorized absence from duty during the strike." Id., at 6 n.2. The Board went on to state that "[t]he

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2/ The filing date for Agency 8 is stated thereon as "January 6, 1981." Since the PATCO strike did not commence until August 3, 1981, the filing date is obviously a typographical error. I will, consequently, construe the filing date to be January 6, 1982.

burden of persuasion would then shift to the employee to rebut the agency's case by presenting evidence to show that he had no knowledge of the existence of the strike or to demonstrate that his was due to some factor other than intentional participation in the strike." Id.

I find that the agency has established that the PATCO strike commencing on August 3, 1981, was in existence on August 7 and continued at least through August 20, 1981. I further find that the agency has made a prima facie showing of strike participation by all appellants. I find also that the agency briefed each appellant about the consequences of participating in a strike and that the agency sent each appellant a telegram directing them to report for duty at their next scheduled shift. I further find that the telegram advised each

appellant that an unauthorized absence from scheduled duty would indicate participation in the strike. I find also that no appellant reported for work during the period of the strike. I find, therefore, since appellants' absences were unauthorized and unexplained, that they were active strike participants. Schapansky v. Department of Transportation, supra.

The appellants may nevertheless rebut the agency's case by presenting evidence to show that they had no knowledge of the strike or that their absences were due to some factor other than their intentional participation in the strike. Schapansky, supra. In this regard, the appellants have raised a number of arguments justifying their failure to report to work during the strike and by their next regularly scheduled shift. Each appellant

will be discussed separately, except as otherwise indicated.

John O. McElvey, Jr.

The appellant represents that he did not report for his 7 a.m. deadline shift on August 7 because he believed he had been fired on August 5. In order to place appellant's argument into perspective, the following facts must be noted.

Specifically, the appellant contends that he was concerned about the safety of air traffic, having spent time at the beginning of the strike listening to the radio of the Tower's operations. Consequently, continued the appellant, he could not in good conscious have performed the duties of an air traffic controller, but that he would have performed non-air traffic functions. Otherwise, contends the appellant, he would have resigned his position.

On the morning of August 4, the appellant testified, he called the

facility to explain the reasons for his absence to Mr. Hubbard, but he was told by another individual that he had to come to the facility to do it. On the afternoon of August 4, the appellant further testified, he went to the facility and observed the FAA police and the news media at the door leading to the Tower. The appellant stated that as individuals presented themselves to the FAA police for admittance, the news media would record their conversations and question them. After observing the scene for about an hour, the appellant represents that he "lost [his] nerve" and decided not to attempt to enter the facility. Transcript dated November 4, Volume IV, p. IV-97. The appellant added that, he would "take a chance" that his deadline was August 7, 7 a.m., and attempt to report then. On August 5, however, the appellant, after

listening to the news conference of Mr. Drew Lewis, Secretary of Transportation, concluded that he had been fired. Tr. pp. IV-88, IV-99, IV-126, IV-127.

I find appellant's argument insufficient to rebut the agency's prima facie showing of his participation in the strike. I have difficulty reconciling appellant's belief that he was fired with his knowledge of his next scheduled shift. While I find that the appellant contacted and went to the facility on August 4, I find no evidence that he contacted the facility after August 5 to ascertain his status. Indeed, I find no evidence that the appellant did anything after the 5th, which I find to be inconsistent with his knowledge that his next scheduled shift was 7 a.m., August 7.

Appellant's activities on August 4 do not change my view. I note that

appellant's contact with the facility on that day was not for the purpose of ascertaining his work status, but simply to advise Mr. Hubbard that he would not perform air traffic duties for safety reasons. The appellant made no effort to enter the facility that day and that he did not because he lost his "nerve" is not sufficient to justify his failure to do so. See Johnson v. Department of Transportation, MSPB Docket No. DC 075281F0998 (November 10, 1982).

I find that the appellant has not rebutted the agency's prima facie case of strike participation.

* * * * *

Terrence L. McClain

August 3, 1981, was appellant's regular day off, with August 4 and 5 being scheduled work days. Appellant's deadline shift was 2:48 p.m., August 5.

The appellant testified, however, that he believed he would be fired if he did not report to work by 11:00 a.m., August 5, and on August 4, the appellant made the decision to return by that time. On August 5, the appellant left for work at approximately 10:00 a.m. in order to meet the 11:00 a.m. deadline. The appellant further testified that he drove to the facility and, since he stopped in route because of dry heaves, he arrived at the facility at approximately 11:20 a.m. Tr., pp. IV-10-IV-11. The appellant continued that he proceeded to the balcony where the entrance to the Tower is located to attempt to see Mr. Hubbard. Upon

arriving there, the appellant testified, he saw armed policemen guarding the Tower entrance. Tr., p. IV-13. The appellant, believing that he would be arrested, left the balcony without making any attempt to enter the Tower. Tr., pp. IV-13-IV-14.

I find that the appellant has not rebutted the agency's prima facie showing of strike participation. The only evidence in rebuttal is appellant's representation, which I find to be corroborated by the testimony of his fiancee, Ms. Helene P. Petrantis, that he left for work on the morning of August 5th. The appellant testified that no one knew he was there except Ms. Petrantis. Tr. p. IV-14. I can only find, based on these facts, that the appellant was present at the facility. I find no evidence that the appellant entered the facility to work or that he made any

attempt to do so.

That the appellant erroneously believed he had to report for work by 11 a.m. does not necessitate a contrary view. Appellant's deadline shift was 2:48 p.m. that day. I am not convinced that the appellant, had he arrived at the facility sometime immediately prior to 2:48 p.m., would have made any attempt to enter, for the guards stationed there at 11 a.m. would have been there at 2:48 p.m.

I find, therefore, that the appellant has not rebutted the agency's prima facie case that he was an active strike participant on August 4 and 5.

* * * * *

JOINT ARGUMENTS

The appellants have raised certain procedural arguments. Under the Board's regulations, the appellants have the

burden of proof. 5 C.F.R. 1201.56(b).

The appellants contend, first, that the agency failed to give them advanced written notice of the specific reasons for their removal. Specifically, the appellants argue that they were not fired for striking, but because they failed to return by their deadline shift.

I have examined appellant's contention and I find no merit to it. I find the reasons for appellants' removal were adequately and clearly stated in the notice of proposed removal. The appellants were told that a strike was called by PATCO, that they were absent during the period of the strike, and that their absence and failure to return to work indicated participation in the strike. I find nothing more required under the facts of this case. See 5 U.S.C. § 7513; 5 U.S.C. 752.404.

The appellants next argue that it was an error for the agency to use the crime exception of 5 U.S.C. § 7513(b), which allows an agency, once it concludes an employee has committed a crime for which a sentence of imprisonment can be imposed, to reduce the advance notice period from 30 days to 7 days.

Appellants' argument was considered and rejected by the Board in Schapansky, supra. Suffice it to say that the Board, in light of 18 U.S.C. § 1918 making striking against the United States a crime punishable by up to one year in prison, concluded that "the agency had reasonable cause to believe that the appellants committed a crime for which a sentence of imprisonment might be imposed. Id., at 8. Thus, the agency's reliance on section 7513(b) was appropriate.

The appellants further argue that the

agency was without authority to maintain them in a non-pay status pending a final decision on the notices of proposed removal. The Board observed in Cuellar v. U.S. Postal Service, MSPB Docket No. SF075299045, November 13, 1981, that the problem of what to do with employees in some cases during the notice period is a longstanding one. Absent agency action, an employee is entitled to be retained in a duty status. Under Office of Personnel Management regulations, the agency could have placed the appellants in a non-duty status with pay for such time, not to exceed ten days, it took to effect the removal action. 5 U.S.C. § 752.404(d). Indeed, the agency's regulations require that the employee remain in an active duty status during the official notice period unless emergency suspension procedures are

implemented. 3/ FAA Order No. 3770.2b, pp. 11-12. Moreover, in Cade v. U.S. Postal Service, MSPB Docket No. SF0752810370, November 24, 1981, at n. 1, the Board held that an appellant who was given a 26 instead of 30 day notice period was prejudiced because he was entitled to be retained in a duty status with compensation for a full 30 days. The Board found that a reasonable resolution was to order the agency to amend its period. Similarly, in appellants' cases, I find it reasonable to order the agency to amend its records to show the appellants in a non-duty with pay status between the date of their deadline shift, since they could not return after this time, and the effective date of their

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3/ Although the appellants were barred from returning after they missed their deadline shifts, emergency suspension procedures were not implemented.

removal.

The appellants also contend that the penalty of removal was inappropriate. The appellants point to several factors 4/ in support of their argument. The Board considered this contention in Schapansky and, after discussing the facts and pertinent law, concluded that the "text of 5 U.S.C. § 7311(3) can be read to require removal as the mandatory penalty for individual federal employees against whom charges of striking are sustained." Id., at 9. Although the Board declined to decide whether mitigation of penalty was foreclosed under § 7311(3) supra, the Board concluded, nevertheless, that no

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4/ The appellants' noted the unequal treatment between returning and non-returning controllers, confusion over the return-to-duty deadline, and appellants' job performance to require a penalty less than removal.

satisfactory basis for mitigation existed. See Douglas v. Veterans Administration, MSPB Docket No. AT0752299006 (April 10, 1981). "[T]he agency's imposition of the penalty of removal," stated the Board, "cannot be deemed clearly excessive or disproportionate to a sustained charge of striking against the agency." Id., at 11. There being no evidence that factors other than those discussed in Schapansky are present in these cases except as have been otherwise noted herein, I find the penalty of removal to be appropriate.

SECOND CHARGE OF AWOL

The agency charged each appellant with AWOL, a charge which, based upon the record and testimony of the parties, I find sustained. In this connection, I

note that the Board has found AWOL and striking to be just cause for removal, since they, by their very nature, disrupt the efficiency of the service. See Schapansky, supra; Butler v. Smithsonian Institution, MSPB Docket No. DC07528090076 (March 30, 1981); Desiderio v. United States Department of the Navy, MSPB Docket No. PH07528010036 (November 17, 1980).

With respect to appellants King, Padgett, and Shelleman, where, as here, only part of the agency's charges are upheld, the Board requires that I scrutinize the remaining charge to determine if the penalty invoked is reasonable. Patermaster v. International-American Foundation, MSPB Docket No. DC07528010033 (February 23, 1982). In so doing, I do not find the instant cases to be typical situations involving employees plagued

with leave problems, and, consequently, it is my view that removal for appellants King, Padgett, and Shelleman is not appropriate. Since I find the sustained charges to warrant disciplinary action, I find the maximum reasonable penalty to be reprimands. Douglas v. Veterans Administration, supra.

DECISION

The agency actions removing appellants King, Padgett, and Shelleman are hereby REVERSED. The agency is hereby directed to cancel the actions and to restore appellants King, Padgett, and Shelleman to their positions retroactive to the effective dates of their removal. The agency is further directed to reprimand the appellants for their unauthorized absences, a copy of which is to be placed

in appellants' official personnel records. The appropriate administrative officer is hereby directed to furnish evidence of compliance with this decision within five days after it becomes final.

The agency action removing the remaining appellants is hereby AFFIRMED.

The agency is directed to amend its records to show all appellants in a non-duty status with pay between the date of their deadline shift and the effective date of their removal.

Any party seeking enforcement of a final decision of the Board may file a petition for enforcement with the Regional Office that rendered the initial decision. Such petition should be directed to the Regional Director and must comply with the

requirements of § 5 U.S.C. Section 1201.181(a).

APPENDIX G

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

Eastern Region
Federal Building
John F. Kennedy International Airport

August 6, 1981

Mr. Terrence L. McClain
1702 Baldwin Drive
McLean, Virginia 22101

Dear Mr. Terrence L. McClain:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-14, $42,919.00 per annum at the Washington Tower. The reasons for the proposed action are:

Reason 1: Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the United

States . . ."; and 18 U.S.C. 1918, which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 1000, on August 4, 1981, when you failed to report to duty, until the present, you participated in a strike against the United States Government.

Reason 2: Unauthorized Absence

Specification: Beginning first at the 1000 to 1800 shift on August 4, 1981, you failed to report for your scheduled tour of duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at Washington Tower. If you wish to review this material, please contact Mr. Jamison Hurst, Jr.

The foregoing action constitutes a strike against the government prohibited by 18

U.S.C. 1918, and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed. Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit if you do not reply, I will issue a written decision on the proposed removal.

/s/ Harry T. Hubbard
Chief
Washington Tower

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

Eastern Region
Federal Building
John F. Kennedy International Airport

August 6, 1981

Mr. Terrence L. McClain
1702 Baldwin Drive
McLean, Virginia 22101

Dear Mr. Terrence L. McClain:

My letter of August 6, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist, GS-2152, $42,919.00 per annum at the Washington Tower. I have given full consideration to all the facts and circumstances in this case including:

( ) Your written reply

of _____.

( ) Your oral reply

of _____.

( ) Your written reply of _____, and/or oral reply of _____, to the designee, his summary and recommendation.

(x) You made no oral or written reply.

I have found that all reasons and specifications cited in the proposal letter are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 23, 1981.

The enclosures with this letter explain your rights to appeal or grieve this

action, and include an Appeal/Grievance Procedure Addendum, the MSPB Appeal Form and a copy of MSPB Regulations. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP) charge against PATCO for its role in the strike and is seeking to have the Union decertified. This case is now being processed by the Federal Labor Relations Authority and a determination that PATCOM committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the Union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

Sincerely,

/s/ Harry T. Hubbard
Chief, Washington Tower

Enclosures

11 August 1981

Department of Transportation
Federal Aviation Administration
Eastern Region, Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

Re: Terrence L. McClain

Dear Mr. Hubbard:

This is to request an extension of time in which to file a written answer to the notice of proposed action against me for the reasons stated below.

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. S.7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

I also understand that even if the crime exception to the 30-day rule is invoked, the controlling criterion is that I am entitled to a "reasonable time," (which may not be less than seven days) in which to file my answer, 5 U.S.C. S.7513(b)(2). I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response.

I request that copies of all the materials relied on by the FAA to support its proposed action be sent to me. By separate letter to the Freedom of Information Office of the FAA, I am also requesting disclosure of all notices of proposed actions issued since January 1, 1978, and between January 1, 1969, and January 1, 1971. As I am entitled to review all of the materials relied on by

the FAA to support its proposed action, see 5 C.F.R. S.752.404, I request that I be given at least 20 days from the receipt of these materials to answer personally the charges.

I hereby designate Mr. Michael W. Fermon as my representative in this proposed action. Please send copies of all communications in this action to:

Mr. Michael W. Fermon
P.A.T.C.O.
1455 Veterans Highway
Hauppauge, New York 11788

Sincerely,

/s/ Terrence L. McClain
Terrence L. McClain

APPENDIX H

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

Eastern Region
Federal Building
John F. Kennedy International Airport

August 7, 1981

Mr. John O. McElvey
3502 Kings Cross Road
Alexandria, Virginia 22303

Dear Mr. John O. McElvey:

This is notice that I intend to remove you from your position of Air Traffic Control Specialist, GS-2152-14, $41,657.00 per annum at the Washington Tower. The reasons for the proposed action are:

Reason 1: Violation of 5 U.S.C. 7311, which states in pertinent part, "An individual may not accept or hold a position in the Government of the United States . . ."; and 18 U.S.C. 1918, which makes participation

in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.

Specification: Beginning at approximately 7 A.M. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred. Beginning at 1448, on August 3, 1981, when you failed to report to duty, until the present, you participated in a strike against the United States Government.

Reason 2: Unauthorized Absence

Specification: Beginning first at the 1448 to 2248 shift on August 3, 1981, you failed to report for your scheduled tour of

duty. On August 3, 1981, you were sent a telegram that an illegal strike was in progress, and that you must return to duty for your regularly scheduled shift. You failed to return to duty, and instead remained absent without authorization.

The material relied upon to support this proposed action is available for review at Washington Tower. If you wish to review this material, please contact Mr. William S. Canty.

The foregoing action constitutes a strike against the government prohibited by 18 U.S.C. 1918, and 5 U.S.C. 7311. This gives me reasonable cause to believe you have committed a crime for which a sentence of imprisonment can be imposed.

Therefore, you may reply to this notice personally, in writing or both, and furnish affidavits and other documentary evidence in support of your answer to me, within 7 calendar days after you receive this letter. In making a reply you have the right to be represented by an attorney or other representative. As soon as possible after your reply is received, or after the expiration of the 7-day limit if you do not reply, I will issue a written decision on the proposed removal.

/s/ Harry T. Bubbard
Chief
Washington Tower

Harry Hubbard
Department of Transportation
Federal Aviation Administration
Eastern Region, Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

Re: Mr. John O. McElvey, Jr.

Dear Harry Hubbard:

This is in response to the proposed removal action against me dated 8/7/81.

Because I have been formed in a pre-prepared notice that FAA believes I committed a crime and because of ambiguities in the notice and the statutes that apply, I cannot deny or affirm the charges at this time.

However I do deny reason #1 and also reason #2.

I also was denied the forty eight hours amnesty issued by the President.

I must also state that my name is John O.

McElvey, Jr. and not John O. McElvey.

In order for me to protect my rights and answer fully, I need to know how it was determined that I was participating in a strike (which is a crime). There is, as far as I know, no definition of the term "strike" or "participating" applicable to employees in the federal sector. I must know this information and how strike status differs from AWOL or sick leave status before I am able to answer the charges.

Sincerely,

/s/ John O. McElvey, Jr.
Mr. John O. McElvey, Jr.
3502 Kings Cross Road
Alexandria, Va. 22303

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

Eastern Region
Federal Building
John F. Kennedy International Airport

August 19, 1981

Dear Mr. John O. McElvey:

My letter of August 7, 1981, informed you of a proposal to remove you from your position of Air Traffic Control Specialist, GS-2152-1-, $41,657.00 per annum at the Washington Tower. I have given full consideration to all the facts and circumstances in this case including:

( ) Your written reply
of _____.

( ) Your oral reply
of _____.

( ) Your written reply
of _____,
and/or oral reply

of _____, to the designee, his summary and recommendation.

(x) You made no oral or written reply.

I have found that all reasons and specifications cited in the proposal letter are fully supported by the evidence and warrant your removal to promote the efficiency of the service. It is my decision, therefore, that you be removed effective August 23, 1981.

The enclosures with this letter explain your rights to appeal or grieve this action, and include an Appeal/ Grievance Procedure Addendum, the MSPB Appeal Form and a copy of MSPB Regulations. In this connection you should know that the FAA has filed an Unfair Labor Practice (ULP)

charge against PATCO for its role in the strike and is seeking to have the Union decertified. This case is now being processed by the Federal Labor Relations Authority and a determination that PATCOM committed a ULP could impact on the processing of grievances under the PATCO/FAA agreement. If the Union is decertified and the agreement terminated, this avenue of appeal may not be available to you.

Sincerely,

/s/ Harry T. Hubbard
Chief, Washington Tower

Enclosures

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

DATE August 24, 1981

IN REPLY
REFER TO Adverse Action File - John O. McElvey, Jr.

FROM WT-1

TO Files

The attached correspondence was received in this facility on August 24, 1981 and was not utilized in the decision making process in this adverse action.

HARRY T. HUBBARD

11 August 1981

Department of Transportation
Federal Aviation Administration
Eastern Region, Federal Building
John F. Kennedy International Airport
Jamaica, New York 11430

Re: John O. McElvey, Jr.

Dear Mr. Hubbard:

This is to request an extension of time in which to file a written answer to the notice of proposed action against me for the reasons stated below.

First, there is no basis to the charge that I have committed a crime for which a sentence of imprisonment may be imposed. Therefore, the crime exception to the rule set forth in 5 U.S.C. S.7513, which requires that I be given a thirty (30) day advance notice of this proposed action, is inapplicable.

I also understand that even if the crime exception to the 30-day rule is invoked, the controlling criterion is that I am entitled to a "reasonable time," (which may not be less than seven days) in which to file my answer, 5 U.S.C. S.7513(b)(2). I do not feel that, under the circumstances that apply, seven days is a reasonable time for filing a response.

I request that copies of all the materials relied on by the FAA to support its proposed action be sent to me. By separate letter to the Freedom of Information Office of the FAA, I am also requesting disclosure of all notices of proposed actions issued since January 1, 1978, and between January 1, 1969, and January 1, 1971. As I am entitled to review all of the materials relied on by

the FAA to support its proposed action, see 5 C.F.R. S.752.404, I request that I be given at least 20 days from the receipt of these materials to answer personally the charges.

I hereby designate Mr. Michael W. Fermon as my representative in this proposed action. Please send copies of all communications in this action to:

Mr. Michael W. Fermon
P.A.T.C.O.
1455 Veterans Highway
Hauppauge, New York 11788

Sincerely,

/s/ John O. McElvey, Jr.
John O. McElvey, Jr.

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.

No. 87-79

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN O. MCELVEY, JR. AND
TERRENCE L. MCCLAIN, PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-79

JOHN O. MCELVEY, JR. AND
TERRENCE L. MCCLAIN, PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the Federal Aviation Administration violated their due process rights in removing them from their jobs as air traffic controllers.

As petitioners recognize (Pet. 4, 17-18), this case is substantially identical to *Darnell* v. *Department of Transportation*, 807 F.2d 943 (Fed. Cir. 1986), petition for cert. pending, No. 86-1746, and the contentions presented by petitioners here are not materially different from the claims presented in the *Darnell* petition. For the reasons stated in our brief in opposition in that case,* further review of petitioners' claims is not warranted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

SEPTEMBER 1987

* We have provided petitioners' counsel with a copy of our brief in *Darnell*.